UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION

SAN ANTONIO BAY ESTUARINE WATERKEEPER and S. DIANE WILSON,	)	
Plaintiffs,	)	
VS.	)	**CIVIL ACTION NO. 6:17-CV-47**
FORMOSA PLASTICS CORP., TEXAS, and FORMOSA PLASTICS CORP., U.S.A.,	)	
Defendants.	)	

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS AND MEMORANDUM IN SUPPORT

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TO THE HONORABLE JUDGE HOYT:

I. INTRODUCTION

The issue before this Court is whether any "effectual relief" remains for Plaintiffs' claims after a recently-issued Agreed Order between TCEQ and Defendants. Thus, this Court should only dismiss this case as moot if it determines that the Agreed Order resolves every request for relief in this case. Because both injunctive relief and civil penalties remain available to resolve Plaintiffs' suit, the Court should deny Defendants' motion and proceed to trial.

The Agreed Order between the Texas Commission of Environmental Quality (TCEQ) and Defendant Formosa Plastics Corporation, Texas executed on January 17, 2019 adjudicates six violations of Defendant's Texas Pollution Discharge Elimination System Permit ("the Permit") in April and May of 2017 from three outfalls. In contrast to the Agreed Order, Plaintiffs' suit seeks relief for thousands of violations over three years from nine of Formosa's outfalls, as well as for failure to report violations, the latter of which is not included in the Agreed Order at all. After the Agreed Order was issued, Plaintiffs amended their complaint to remove any requests for relief for the six violations covered by the Agreed Order. (See Plaintiffs' First Amended Complaint, Docket No. 45 ¶ 120). Moreover, Plaintiffs present evidence in this Response showing that, despite the Agreed Order, violations are continuing and/or have a reasonable prospect of continuing.

Injunctive relief remains available because Plaintiffs' evidence demonstrates that the Agreed Order has not stopped the violations from continuing, and civil penalties are still available based on Plaintiffs' numerous alleged violations that are not covered by the Agreed Order. Disputed facts at the center of Plaintiffs' claims remain for trial, including: whether and how often Formosa has discharged plastics in violation of its TPDES permit since at least January 2016 from its 9 of its external outfalls, whether and how often Formosa has failed to

report violations of plastics discharges in violation of its TPDES permit since at least January 2016, whether illegal discharges have continued to occur or have a reasonable likelihood of continuing, and facts related to the amount of penalties and injunctive relief the Court should impose to remedy Formosa's violations.

Plaintiffs respectfully request that the Court deny Defendants' Motion to Dismiss, because "effectual relief" in the form of civil penalties and injunctive relief remain available in this case, and disputed facts remain to be determined at trial.[1]

Finally, Defendants' 12(c) failure to state a claim argument is improperly raised in this motion because neither the Court nor Plaintiffs granted leave for Defendants to raise this claim past the dispositive motion deadline. Thus, Plaintiffs request that the 12(c) portion of Defendants' motion to dismiss be struck by the Court.

II. STANDARD OF REVIEW

A. Standard of Review for 12(b)(1) Motions Based on Mootness

The doctrine of mootness prohibits a court from deciding cases where, over the course of litigation, the court's ability to provide remedy through the judicial process is eliminated because "the controversy ceases to exist." *Dailey v. Vought Aircraft Co.*, 141 F.3d 224, 227 (5th Cir. 1998) (citing *Church of Scientology of California v. United States*, 506 U.S. 9, 12 (1992)). However, a case should not be dismissed as moot so long as the non-moving party is not "divested of all personal interest in the result" or the effect of the alleged violation is not "completely eradicated and the event will not occur again." *Id.* (citing *Church of Scientology*,

[1] If, however, the Court grants Defendants' motion to dismiss the case based on the Agreed Order mooting out Plaintiffs' claims, Plaintiffs request an opportunity to fully brief the issue and put on evidence for the Court that Plaintiffs' actions led to the enforcement by the government agency, and therefore Plaintiffs are still entitled to recover reasonable attorneys' fees. *See Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, 933 F.2d 124, 128 (2nd Cir. 1991)*; see also Murphy v. Fort Worth Indep. Sch. Dist.*, 334 F.3d 470, 471 (5th Cir. 2003) ("[A] determination of mootness neither precludes nor is precluded by an award of attorneys' fees.")

506 U.S. at 12-14). If there remains "any effectual relief" that a court may grant, a case should not be dismissed as moot. *Calderon v. Moore*, 518 U.S. 149, 150 (1996) (per curiam).

Due to the procedural posture of this case, the Court should treat Defendants' 12(b)(1) motion to dismiss as a Rule 56 motion for summary judgment pursuant to *Williamson v. Tucker*. In deciding a 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, a court may rely on "(1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981). Therefore, "the district court may consider matters outside the pleadings" when resolving a 12(b)(1) motion to dismiss. *Save Our Cemeteries, Inc. v. Archdiocese of New Orleans, Inc.*, 568 F.2d 1074, 1076 (5th Cir. 1978).

When courts consider materials outside the pleadings to resolve motions to dismiss for lack of subject matter jurisdiction, there is a strict standard of review when the attack on jurisdiction is based on an element of plaintiff's claim. *Williamson*, 645 F.2d at 415. In these cases the court should only dismiss for lack of jurisdiction when the plaintiff's federal claims are "clearly insubstantial or immaterial". *Id* at 416 (discussing that standard established in *Bell v. Hood*, 327 U.S. 678 (1946)); *see also Clark v. Tarrant Cty., Texas*, 798 F.2d 736, 742 (5th Cir. 1986); *Montez v. Dep't of Navy*, 392 F.3d 147 (5th Cir. 2004)). The existence of subject matter jurisdiction is considered intertwined with elements of a plaintiff's claim where the same federal statute provides both the cause of action and the basis for a federal court's subject matter jurisdiction. *Clark*, 798 F.2d at 742.

When the federal claims are not insubstantial or immaterial and when, as in this case, a 12(b)(1) motion's attack on jurisdiction is intertwined with the merits of plaintiff's claims,

Defendants are "forced to proceed under Rule 12(b)(6) (for failure to state a claim on which relief can be granted) or Rule 56 (summary judgment) both of which place greater restriction on the court's discretion." *Williamson,* 645 F.2d. at 415. In such a procedural posture, the Court should either take the Plaintiff's allegations as true under the 12(b)(6) standard, *Id.* at 415-16, or it should view "all evidence in the light most favorable to the non-moving party" and draw "all justifiable inferences in the nonmovant's favor" as with Rule 56 motions for summary judgment. *Environmental Conservation Organization v. City of Dallas*, 529 F.3d 519, 524 (5th Cir. 2008). As this Court has been asked to review materials outside the pleadings, it should treat Defendant's motion as a Rule 56 motion for summary judgment.[2] *See* Fed. R. Civ. P. 12(d) ("If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56.")

In this case, the existence of the Court's subject matter jurisdiction is dependent on whether effectual relief remains available to remedy Plaintiffs' claims (that Formosa is in violation of its effluent standards and failed to report those violations). The determination of whether a remedy exists for either of these claims requires the Court to decide whether Formosa is in violation of its permit. Therefore, it should dismiss this case only where it determines there remains no case or controversy after viewing all evidence in the light most favorable to the Plaintiff and resolving all inferences in that party's favor.

III. EVIDENCE SUPPORTING PLAINTIFFS' RESPONSE

[2] The defendants in each of the three primary cases relied on by Formosa to assert why Plaintiffs' claims have become moot asked the court to rule on a motion for Summary Judgment following the execution of settlement orders. *See Eastman Kodak*, 933 F.2d at 127; *Environmental Conservation Organization v. City of Dallas*, 529 F.3d 519, 524 (5th Cir. 2008); *Comfort Lake Association, Inc. v. Dresel Contracting, Inc.*, 138 F. 3d 351, 354 (8th Cir. 1998).

In support of its Response to Defendant's Motion to Dismiss under FRCP 12(b)(1), Plaintiffs rely on and incorporate the following evidence, in addition to the evidence attached to Defendants' Motion:

Declaration of Erin Gaines

Exhibit A - Final Agreed Order Penalty Calculation Worksheet

Exhibit B – Facility Map of Formosa's Point Comfort Facility

Exhibit C - Consent Decree from *USA* v. *City of Dallas*

Exhibit D - TCEQ October 2018 Notice of Violation against Formosa

Exhibit E - Deposition Excerpts of Lisa Vitale

Exhibit F - Deposition Excerpts of Eric Barrier

Exhibit G - Deposition Excerpts of Mike Rivet, as corp. representative of Formosa Texas

Exhibit H - Deposition Excerpts of Gary Patek

Exhibit I - Deposition Excerpts of Myron Spree

Exhibit J - Final Horizon 7s Incident Action Plan (IAP)

Exhibit K - Most Recent Horizon 8s Incident Action Plan (IAP)

Exhibit L - 2013 Drainage Study Outfall 6 Excerpts

Exhibit M - Deposition Excerpts of Rick Crabtree

Exhibit N – Excerpts of TCEQ Executive Director's Response to Comments, TPDES Permit No. WQ0002436000

Exhibit O - Affidavit of Donna Phillips

Exhibit P - Affidavit of Dr. Aiza Jose-Sanchez

Exhibit Q - Affidavit of Dr. Jeremy Conkle

Exhibit R - Affidavit of Diane Wilson, with Attachment

Exhibit S - Affidavit of Ronnie Hamrick

Exhibit T - Affidavit of Michael Mang

IV. FORMOSA'S PERMIT AND THE STATUTORY BACKGROUND

A. Statutory background

The Clean Water Act makes unlawful discharges of pollutants into waters of the United States. 33 U.S.C. §1311(a). Only those discharges within permitted effluent standards are

allowed. 33 U.S.C. §1342. The Act provides for citizen enforcement against any permittee who "is in violation" of their permit standards. 33 U.S.C. §1365(a). The Supreme Court has held that a plaintiff alleges a permittee is in violation when it pleads there is "reasonable likelihood that a past polluter will continue to pollute in the future." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57 (1987).

The Clean Water Act grants jurisdiction to the U.S. district courts to impose injunctive relief in citizen suits against permittees in violation by requiring compliance with the permit standards. 33 U.S.C. §1365. It also grants federal district courts jurisdiction to extract civil penalties of up to $53,484 per violation, per day. *Id.* The U.S. District Courts may also award costs of litigation. 33 U.S.C. §1365(d).

B. Formosa's Relevant Permit Terms for this Case

i. Discharges of Floating Solids

At Formosa's facility there are 12 outfalls (numbered 002-013) that discharge stormwater into either Cox Creek or Lavaca Bay and one outfall (001) that discharges wastewater and treated stormwater via a pipe directly into Lavaca Bay. [*See* Map of Formosa's Outfalls, Exhibit B]. Discharges from these outfalls must meet the effluent standards set by TCEQ in Formosa's Water Quality permit WQ002436000. That permit provides that "there shall be no discharge of floating solids or visible foam in other than trace amounts" at all external outfalls (001-013). [Exhibit A-3 to Motion at 2b, 2m, & 2n.] Additionally, TCEQ regulations prohibit the discharge of "floating debris or suspended solids" into surface waters. 30 T.A.C. 307.4(b)(2). This prohibition is incorporated by reference into the permit. [Exhibit A-3 to Motion at 39].

ii. Reporting Requirements

TCEQ regulations also require that any permit noncompliance that endangers health and human safety, or the environment be reported to TCEQ. 30 T.A.C. 305.125(9). Reports of

noncompliance are to be made orally within 24 hours and again in writing within 5 days. *Id.* Formosa's permit incorporates the content of this regulation. [Exhibit A-3 to Motion at 5; *see also* TCEQ Response to Comments, Exhibit N at 9 ("Formosa must notify the TCEQ within 24 hours of any noncompliance, including the discharge of polyethylene pellets.")].

C. The Agreed Order between TCEQ and Formosa

On January 17, 2019, TCEQ signed an Agreed Order adjudicating violations of Formosa's permit. [Exhibit A-13 to Motion at 6]. The Order concludes that Formosa "failed to prevent the discharge of solids in other than trace amounts" at three of its stormwater outfalls. *Id.* at 2. The violations in the Agreed Order were documented in a record review conducted by a TCEQ investigator on April 4, 2017. *Id.* at 1. The TCEQ penalty calculation worksheet establishes the violations adjudicated by the Agreed Order, assessing a penalty for six violation events between April 4, 2017 to May 17, 2017. [Exhibit A at 6; Exhibit O ¶ 7]. These six events are comprised of two events at each of three outfalls – 006, 008, and 009. [Exhibit A at 6]. Formosa Plastics Texas was fined $121,875 total, for both the violations of floating solids and a separate sampling violation, of which $112,500 was for the plastic pellet discharge violations. [Exhibit A at 4-6; Exhibit O ¶ 20].

The Agreed Order recognized that Formosa implemented a "pellet recovery system" by July 31, 2017, including installing a cone filter, floating booms, wedge and gate screens, and gabions. [Exhibit A-13 to Motion at 2]. The Agreed Order did not include a finding, however, that violations have ceased as a result of this pellet recovery system. The only prospective corrective measures required are "evaluations" of the facility, Cox Creek, and Lavaca Bay 60 days after execution of the Order and on a semi-annual basis after. *Id.* at 3. Formosa is then required to "remove and properly dispose of any discharged solids" and document their evaluations and clean-up. *Id.* at 3.

Additionally, the Order resolves "only the matters set forth by [the] Order. The Commission shall not be constrained in any way from requiring corrective actions or penalties for violations that are not raised here." [Exhibit A-13 to Motion at 2-3]. These six events are the only violations resolved by the Agreed Order for discharges of floating solids "in other than trace amounts" from the Formosa facility. [Exhibit O ¶ 72, 17, 19, 25]. Discharges from Outfalls 001, 002, 004, 005, 007, and 012 are not covered by the Agreed Order. *Id.* ¶ 26. Failure to report violations are also not covered by the Agreed Order. *Id.* ¶ 27.

D. Plaintiffs' Comments on the Proposed Agreed Order

Plaintiffs provided comments on the proposed Agreed Order during the public comment period. [*See* Exhibit A-11 to Motion]. Plaintiffs' primary concern with the Proposed Agreed Order was its limited scope. Plaintiffs asserted the proposed order only covered a "subset of violations" alleged in this litigation. *Id*. at 2. Plaintiffs urged TCEQ to find Formosa's ongoing violations began June 16, 2010, when the EPA found pellet discharge violations. *Id*. at 3. In the alternative, Plaintiffs suggested the violation start date used in this litigation. *Id*. at 4. Plaintiffs did not simply complain that TCEQ's penalty was too small to cover the violations in the Agreed Order. Instead, Plaintiffs urged TCEQ to address the full extent of Defendants' discharges which would have resulted in the adjudication of anywhere from 433 to 2,527 days of violations. *Id* at 7.

TCEQ declined to make any changes to the Order in response to Plaintiffs' comments. [Exhibit A-12 to Motion]. Instead, TCEQ's response to Plaintiffs' comments made clear it was penalizing Formosa Plastics Texas for violations within a discrete time period. The Agency responded that the Defendant failed to submit the appropriate paperwork which was "documented by TCEQ in the April 4, 2017 record review and is therefore used as the violation start date for penalty calculation." *Id.* at 3. The Agency further states that "the end date was for

continuing violations is the screening date for penalty calculation." *Id.* at 2. The screening date for this case was May 17, 2017. [Exhibit A at 6]. So, instead of pursuing penalties for ongoing violations starting before April 4, 2017, the Agency penalized Formosa Texas for violations during April and May 2017 only. *Id.*

Plaintiffs requested that TCEQ impose a remedy that would cause the violations to cease, including an adequate engineering fix, performance standards, and monitoring tools to ensure the performance standards are achieved. [Exhibit A-11 to Motion at 15]. Plaintiffs submitted a photo taken on June 20, 2018 showing a substantial quantity of floating pellets outside Outfall 006 indicating that the discharges from that Cox Creek outfalls had not ceased. *Id.* at 4. The Agency declined to impose further remedies in this Agreed Order, but responded that the Order does not prevent an enforcement agency such as TCEQ from taking "further action' against Formosa "[i]f TCEQ determines the measures taken by [Formosa] are inadequate and there are additional documented discharges of solids." [Exhibit A-11 to Motion at 5].

V. ARGUMENT AND AUTHORITIES

A. Plaintiffs' Claims should not be dismissed for lack of Subject Matter Jurisdiction because "effectual relief" exists and factual disputes remain for the Court to determine at trial

Plaintiffs do not challenge the adequacy of the penalties imposed by the Agreed Order between TCEQ and Formosa as to the six violation events it addresses. After the Agreed Order was issued, Plaintiffs removed six violation events from the penalty calculations sought by this suit. [First Amended Complaint at ¶120]. Plaintiffs' Complaint alleges that several hundred *additional* dates of violations from more outfalls have occurred over the previous three years. These thousands of total violations are not covered by the Agreed Order. *Id.* at ¶ 117-118. This was the same position maintained by Plaintiffs during the proposed Agreed Order's public comment period. Additionally, Formosa has admitted that it has not reported a floating solids

discharge to TCEQ in the last five years. [*See id*. at ¶60; Defendants' Original Answer and Defenses to Plaintiffs' First Amended Complaint, Docket No. 60 at ¶60]. Plaintiffs' claim for failure to report violations "was also not considered or adjudicated by TCEQ in the Agreed Order." [Phillips Aff., Exhibit O ¶ 27].

If at trial, the Court determines Defendants have violated their permit it can still provide "effectual relief" for Plaintiffs' claims through at least two avenues: 1) *injunctive relief* because in spite of the Agreed Order, violations are continuing and will continue, and 2) *civil penalties* for each violation not covered by the Agreed Order. In order for the Court to ultimately determine the appropriate remedies for Plaintiffs' claims, it must determine whether, when, and how frequently, Defendants are discharging pollutants in violation of the effluent limitations established in the permit and have failed to report those violations.

As such, the Court should deny Defendants' Motion because effectual relief is still available, and proceed to trial to resolve these factual determinations related to liability and remedies.

i. Injunctive Relief is still an available remedy in this case because violations are continuing, or there is at least a reasonable prospect violations will continue

Corrective actions taken in response to enforcement actions do not preclude the availability of injunctive relief in citizen-suits where a court determines either a) violations are in fact continuing or b) despite the terms of the agreement there is a "reasonable prospect" violations will continue. *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.,* 933 F.2d 124, 128 (2nd Cir. 1991). The Fifth Circuit has followed the Second Circuit in adopting this standard. *See City of Dallas,* 529 F.3d at 528-29 (reasoning if Plaintiffs showed a reasonable prospect of violations continuing despite the order then it would be unlikely the enforcing agency had diligently prosecuted the violations). The Fifth Circuit defines the "reasonable prospect" test

as whether there are violations that "will not be cured even after the remedial plan imposed by the consent decree." *Id*. at 530.

The Court should not dismiss this suit as moot if it determines, after reviewing disputed facts in a light most favorable to Plaintiffs, that a trier of fact could find either a) discharges in violation of Formosa's permit are in fact continuing, or b) despite the terms of the Agreed Order, there is a reasonable prospect the violations will continue. This is because if violations have not ceased or there is a likelihood of recurrence then the Agreed Order has not "eliminated the basis for the citizen suit". *Eastman Kodak*, 933 F.2d at 127. Defendants have not produced any evidence to indicate their violations have ceased or will not continue in the future. Instead they have relied on conclusory statements. Evidence in this response shows that Plaintiffs' claims should not be dismissed as moot under this standard.

a. Evidence that Formosa's permit violations are continuing

Evidence from a variety of sources after July 31, 2017 of ongoing violations of plastics discharges in greater than trace amounts and in violation of Formosa's permit is summarized below. Attached to this Response is a subset of Plaintiffs' evidence that will be presented at trial.

1. Evidence of ongoing violations by TCEQ

In October of 2018, well over a year after Formosa implemented its corrective measures from the Agreed Order, TCEQ found in a separate investigation report that Formosa had violated its permit by discharging plastic pellets and "floating white debris" in more than trace amounts at outfalls 001, 006, 008 and 009. [Exhibit D, at 7]. In the report, the investigator noted "[f]acility personnel stated that due to the high flows and build up of debris, the gates had to be raised. … Facility representatives stated that heavy rainfall earlier that week led to the conditions noted by the investigator." *Id*. These findings by TCEQ demonstrate the agency's own findings

that the Agreed Order, which adjudicated earlier violations from 2017, has not prevented subsequent, ongoing violations of plastics discharges from occurring.

2. Evidence collected by Plaintiffs and local citizens

Over the last three years, Plaintiffs and other local citizens have gathered extensive evidence of regularly occurring plastics discharges in more than trace amounts at and downstream of Formosa's outfalls, including over 2,360 samples and thousands of photos and videos from locations along Cox Creek, Lavaca Bay, and Matagorda Bay. [Wilson Aff., Ex. R, ¶ 4 and Figure A]. A small subset of recent representative photographs by Plaintiffs showing discharges of plastics and sampling efforts by Plaintiffs at locations along Cox Creek and Lavaca Bay are included in attached affidavits by Diane Wilson and Ronnie Hamrick. [*See* Ex. R, Figures B-Y; Hamrick Aff., Ex. S, Figures A-F]. Mr. Hamrick along with Waterkeeper volunteer David Sumpter "try to go out five or six times a week" to to take samples and photos of discharged pellets. [Ex. S at ¶ 6]. "On both Cox Creek and Lavaca Bay, to this day, I continue to find discharged pellets and plastic powder on the shores and in the waters." *Id*. at ¶ 7. Plaintiff Diane Wilson kayaks in Cox Creek to photograph discharged pellets at Formosa's more difficult to see outfalls. She provides the Court with photographs of pellets and plastic powder discharges at outfalls 001, 002, 004, 005, 006, 007, 008, 009, and 012. [Ex. R, Figures B-Y].

The amounts of plastics documented by Plaintiffs in many instances are equal to or greater than the amounts in violations documented by TCEQ in photos attached to Formosa notices of violations. (*Compare, e.g.*, photos in Exhibit D to Response at 99-110, *with* Ex. R, Figures B-Y and Ex. S, Figures A-F).

Local concerned citizens have also found plastics floating near Formosa's outfall 001. For example, community member Michael Mang, a hydrographic surveyor, set up a net near Formosa's outfall 001 in Lavaca Bay and trapped pellets and plastics in June 2018. [Mang Aff.,

Exhibit T, ¶ 8-10]. On January 27, 2019, Mr. Mang was near outfall 001 and was "shocked by the plastics being discharged at the [001] diffuser. There were so many pellets and flakes at the diffuser that it looked like it was snowing." *Id.* ¶ 11. Another local resident, Myron Spree, has since about February 2018 gone out on a boat and collected samples and taken photos and videos of pellets and "plastic material" that is "flaky" and "like snow, floating, suspended" coming from Formosa's outfall 001 in Lavaca Bay. [Spree Dep., Exhibit I, at 76:10-77:14, 80:18-25, 82:9-18, 90:10-91:4]. He has observed birds dipping into the water near Formosa's outfall 001, including "a lot of plastic material, a lot of stuff floating… and a seagull come through there, dipped down and ... possibly picked up something in the water," *id.* at 87:12-23, and a couple days prior to his deposition, "some pelicans coming in and dipped right into the outfall, right into the flow" where "there was all kinds of powder on the water." *Id.* at 87:24-88:13. Mr. Spree has shared samples, photos, and videos he has collected of plastics from near Formosa's outfall 001 discharge point in Lavaca Bay with Formosa, TCEQ, and Plaintiffs. *Id.* at 78:8-79:19, 85:17-86:12.

3. Opinions of Plaintiffs' Expert Witnesses

One of Plaintiffs' experts, Texas A&M Corpus Christi environmental scientist Jeremy Conkle, as of the date of his affidavit, had made six visits to Cox Creek and Lavaca Bay.[3] Dr. Conkle describes seeing "plastic pellets and/or powder discharged in the environment in shocking quantities." [Conkle Aff., Exhibit Q ¶ 7]. In his affidavit he provides photographs of pellets and powder he has seen on Cox Creek and Lavaca Bay. "In my opinion," Dr. Conkle states, "the discharge of pellets and powder by Formosa Texas has continued, is ongoing, and must be stopped…. The discharged nurdles stress the already fragile Lavaca Bay system and Cox Creek." *Id.* ¶ 37. In his affidavit, Dr. Conkle describes testing he has done on pellets collected

[3] Dr. Conkle visited Cox Creek and Lavaca Bay again on February 12, 2019, and kayaked up Cox Creek where he will testify he saw pellets and powder.

from Lavaca Bay and Cox Creek, where mercury was detected in the pellets. He explains, "The nurdles will likely transport mercury as well as other organic pollutants." *Id.*

Plaintiffs' engineering expert, Dr. Aiza Jose-Sanchez, has reviewed Formosa Texas' stormwater and wastewater systems to determine whether they are adequate to prevent the discharge of plastics. She concludes, "My opinion is that both stormwater and wastewater systems are inadequate to prevent the discharge of plastics and that the plastics have been and will continue to be discharged in more than trace amounts." [Jose-Sanchez Aff., Exhibit P ¶ 2]. Dr. Jose-Sanchez explains that the discharges of plastics have been "extensive, historical, and repetitive." *Id.* ¶ 3.

4. Evidence from Defendants' Contractors

Documents about cleanup efforts of the company Formosa has contracted with, Horizon Environmental Services, and the Horizon corporate representative deposition testimony of Eric Barrier provide further evidence that Formosa's discharges and permit violations are ongoing. [*See* Exhibits F, J, K]. Incident Action Plans (IAP) produced by Horizon show daily collections of hundreds of bags of plastic pellets and powder mixed in with debris on Cox's Creek starting in April of 2017 through early January 2019, and ongoing.[4] [Exhibit J at 15-20; Exhibit K at 15-18]. They also show weekly or bi-weekly collections of plastic pellets and powder at Lavaca Bay during the same time period. [Exhibit J at 20-23; Exhibit K at 18-19]. Eric Barrier of Horizon has testified that his crews clean an area and when they come back at a later date there are more pellets present. [Barrier Dep., Exhibit F at 140:2-140:20; 141:12-143:9]. This is true for the Marina on Lavaca Bay, *Id.* at 46:2-50:12, and for the outfalls on Cox's Creek. *Id.* at 80:2-84:11. He has also testified that Horizon has on several occasions cleaned pellets out of the concrete pipes directly downstream of the discharge points of Formosa's outfalls 008 and 009, despite the

[4] The most recent IAP Plaintiffs have received from Formosa was prepared on January 11, 2019. [*See* Exhibit K]

fact that Formosa has controls such as screens at the discharge points for these outfalls. *Id.* at 164:6-166:18.

Lisa Vitale, a representative for the company that Formosa contracts with to perform a bay monitoring program as part of their Permit, testified in her deposition that she and her colleagues have seen floating white pellets or small plastic pieces in Lavaca Bay and in the area near outfall 001 as part of their monitoring work, and that in the past three years they have seen the plastics "more often" than in prior years. [Vitale Dep., Exhibit E at 25:21-26:14, 29:13-31:11, 39:13-19] Ms. Vitale also testified that she has told John Hyak of Formosa about these sightings as well as sent him water samples with the pellets about five or six times, including at least one time prior to 2010 and one time in November 2018. *Id.* at 27:3-28:23.

5. Evidence of Failure to Report violations

Formosa admits it has not reported any floating solids discharges to TCEQ in the last five years. [Defendants' Original Answer and Defenses to Plaintiffs' First Amended Complaint, Docket No. 60 ¶ 60]. As such, Formosa continues to fail to report their discharges of plastics in violation of their permit.

All of this evidence, when viewed at this summary judgment stage in the light most favorable to Plaintiffs, shows continuing violations of 1) plastics discharges and 2) failure to report those discharges from Formosa's facility.

b. Plaintiffs' evidence also shows that, despite the Agreed Order, there is a reasonable prospect violations will continue

If, after giving "some deference to the judgment of state authorities," the Court determines the corrective actions required by the Agreed Order do not reasonably assure the cessation of violations of Defendant's permit, then Plaintiffs' claims are not moot, as injunctive relief remains available. *See Eastman Kodak*, 933 F.2d at 128. If, after viewing the evidence in a

light most favorable to Plaintiffs, the Court determines there is a material question of fact as to whether there is a reasonable prospect that violations will continue despite the alleged corrective actions by defendants, it should deny Defendants' motion to dismiss and proceed to trial on the merits.

In two of the three main cases relied on by Defendants in their Motion, the courts determined Plaintiffs had not met their evidentiary burden.[5] First, in *Comfort Lake*, the regulatory agency terminated the permit after the cessation of construction activities at the permitted site. *Comfort Lake Ass'n, Inc. v. Dresel Contracting Inc.*, 138 F.3d 351, 354 (8th Cir. 1998). Plaintiffs alleged that construction at the permitted site was ongoing and therefore discharges were still occurring, but the Eighth Circuit found that no evidence was presented by Plaintiffs to support their claim. *Id.* Second, in *City of Dallas,* Plaintiffs relied on an expert's affidavit and the testimony of City officials as evidence that violations were likely to continue after an agency order, however, the Fifth Circuit found that Plaintiffs' evidence spoke only to violations *prior* to the order, and did not attest to the sufficiency of the corrective actions of the City. *City of Dallas*, 529 F.3d at 529.

Contrary to the evidence presented by plaintiffs in the cases relied on by Defendants, Plaintiffs here provide extensive evidence, including: 1) an expert affidavit discussing the inadequacy of the corrective measures in the Agreed Order, 2) evidence from Formosa's documents demonstrating the problems leading to the violations have not been fixed by the corrective actions included in the Order and additional controls are needed, and 3) evidence of

[5] In the third, *Eastman Kodak*, the Second Circuit determined no factual determinations were made at the district court level as to whether violations had ceased or if the order eliminated the reasonable prospect of future violations, so it remanded the case. *Eastman Kodak*, 933 F.2d at 128. The district court on remand never reached these factual determinations because that element of the case settled outside of court. *Atlantic States Legal Foundation v. Eastman Kodak Co*., 809 F. Supp. 1040, 1044 (W.D.N.Y. 1992).

ongoing violations after the corrective action, documented by TCEQ and Plaintiffs (see evidence cited and discussed *supra* in Section V.A.1.a).

1. Expert opinion on the insufficiency of the corrective measures in the Agreed Order to resolve permit violations

Formosa's "pellet recovery system" discussed in the Agreed Order was allegedly completed by July 31, 2017, a year and a half prior to the final entry of the Agreed Order. [Exhibit A-13 to Motion, at 2]. The only *prospective* actions required by TCEQ are a series of site evaluations and the clean-up of pellets identified in the evaluations accompanied by written certifications of compliance to TCEQ. *Id.* at 3. Therefore, evidence indicating inadequacies of Formosa's pellet recovery system or illegal discharges occurring after July 31, 2017 demonstrate a reasonable prospect that violations will continue to occur despite the Agreed Order.

Plaintiffs' expert Dr. Jose-Sanchez discusses specifically the "pellet recovery system" mentioned in the Agreed Order, "installing a cone filter, floating booms, wedge and gate screens, and gabions." [Exhibit P ¶ 19 (quoting Agreed Order, Exhibit A-13 to Motion, at FOF 3b)]. Dr. Jose-Sanchez states that the methods used in the "pellet recovery system" in the Agreed Order "are insufficient controls to prevent ongoing and future discharges of plastics in Formosa's stormwater system and that discharges of plastics will continue in more than trace amounts until specific measures such as those proposed in my expert reports are taken." *Id.* ¶ 19. Dr. Jose-Sanchez notes that the Agreed Order does not address outfall 001, where Formosa discharges its wastewater into Lavaca Bay, and "[i]n my opinion," she states, "the Plant will continue to discharge plastics in more than trace amounts into Lavaca Bay until proper source control and engineering changes are made to the Plant." *Id.* ¶ 24.

Dr. Jose-Sanchez also explains that the hydraulic capacity of Formosa's stormwater system has "important implications in the proper control of pellets and powder to ensure

compliance with Formosa's permit." [Exhibit P, ¶ 13]. Specifically, she states that "[b]ecause the hydraulic capacity of the conveyance system is limited, pellets and powders will likely be released through stormwater in rainfall events that exceed the capacity of the conveyance system." *Id.* ¶ 15.

2. Evidence from Formosa Employees and Documents

Documents included in the October 2018 TCEQ investigation, including photographs from Formosa, show that some of the corrective measures discussed in the Agreed Order are not functioning properly. [Exhibit D at 40, 44 (cone filter failures), 78, 82, 92, 94, 96 (blockage or bypassing of gate screens)] Formosa managers have testified that they are evaluating but have not yet implemented additional pellet source control measures, such as a "lazy river" concept, at all the production units to address "problems with releases of pellets and powder," and that pellet recovery is a "priority." [*See* Rivet Dep., Exhibit G at 48:25-49:23, 51:13-52:4, 54:15-55:25, 87:1-97:22; Patek Dep., Exhibit H at 63:3-64:22, 78:15-79:20, 88:21-89:25, 94:2-23] Internal Formosa documents and emails discussing the proposed South Pond project, many of which Formosa claims are confidential, admit inherent flaws in the current stormwater system and the need for additional engineering controls to prevent the discharges of plastics from Formosa's facility.[6]

Formosa commissioned a drainage study, which was completed in 2013, "to address the flooding problems which exist in several areas of the facility." [Exhibit L at 2].[7] The Ganem and Kelly Surveying Drainage Study studied, modeled, and identified any "problem areas" for 8

[6] Plaintiffs have challenged the confidentiality of these documents, *see* Docket Entry No. 62 at 3, 12-13, and seek to make them public during the trial of this case.

[7] Although this document, which was produced in discovery by Formosa, is still marked "Confidential," Formosa agreed in a letter entitled "Response to confidentiality challenge dated January 14, 2019" (email from Diana Nichols, counsel for Defendants, to Plaintiffs' counsel on February 2, 2019) that "Formosa will release the confidentiality designation on ... [among other items] Rivet, Corp. rep. ex 12" but Defendants have not yet produced to Plaintiffs a version with the confidentiality stamp removed.

of Formosa's stormwater outfalls [*See, e.g.*, Excerpts from Outfall 6 Drainage Study, Exhibit L]. The study found that in the drainage area for outfall 6, for example, which includes three pellet-producing units, "[l]ong stretches consisting of undersized culverts make this section virtually useless for storm water detention," *id.* at 5, and concludes that Formosa's "gate valve system requires a detention system be put in place for the plant not to experience flooding." *Id.* In addition, internal emails from 2016 between Formosa managers state that, "[t]he Outfalls are not large enough to hold water during rainfalls to effectively skim the pellets," a statement which Rick Crabtree, the Formosa Texas plant manager, agrees with. [Crabtree Dep., Exhibit M, at 70:17-19, 71:1-4]

This evidence indicates that the Court could conclude that Formosa has ongoing violations of its permit or there is a reasonable likelihood that violations will continue despite the "corrective actions" of the Agreed Order. Therefore, injunctive relief remains an available remedy for Plaintiffs' claims and this Court retains jurisdiction to hear this case.

ii. Penalties are still an available remedy in this case because the Agreed Order does not cover all violations or claims alleged in this case

Plaintiffs' complaint alleges hundreds of days of violations and thousands of total violations from nine of Formosa's permitted outfalls beginning in January 2017 and continuing to present day. The Clean Water Act grants courts jurisdiction over citizen suits when "citizen-plaintiffs make a good faith allegation of continuous or intermittent violations" of National or State issued Pollution Discharge Elimination System permits. *Gwaltney* 484 U.S. at 64 (1987). Citizens suits are intended to supplement rather than supplant agency enforcement action. *Id.* at 60. Where, as in this case, citizen-plaintiffs' claims include alleged violations not adjudicated by

the enforcing agency, jurisdiction remains for the fact-finder to determine whether the violations have occurred and what civil penalties should be assessed against the violating entity.[8]

Civil penalties can be recovered for any violation the Court ultimately finds has occurred and is not covered by the Agreed Order. This is because in cases where only a few of the alleged violations have been enforced by the government agency, the citizen suit is still serving its proper role of supplementing, rather than supplanting, agency action. *See Atlantic States Legal Foundation v. Pan American Tanning Corporation*, 993 F.2d 124, 1022 (2nd Cir. 1993) (discussing the supplementary purpose of a citizen suit and finding that precluding awards for civil penalties not covered in agency orders is "inconsistent with the goals" of the CWA).

In *Pan American Tanning*, the agency settlement order in question covered violations between May of 1989 and June of 1990, and October 1990 and June 1991. *Id*. at 1019. The citizen suit complaint alleged continuing violations beginning in November of 1984, and at least 34 alleged violations had occurred after the complaint was filed on August 14, 1990. *Id*. The Second Circuit determined that the settlement agreement did not cover all the violations alleged by Plaintiffs and did not moot out the citizen suit's claim for civil penalties because there was not a "dispositive administrative" settlement. *Id*. at 1022. Citing the Second Circuit's case in *Pan American Tanning*, the Fifth Circuit has also recognized there is a distinction between settlement orders that cover some violations and those that cover all. *See City of Dallas*, 529 F.3d at 531

[8] Courts have also found that even where injunctive relief is no longer available, civil penalties are. *Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc.* 897 F.2d 1128, 1135 (11th Cir. 1990) ("[T]he mooting of injunctive relief will not moot the request for civil penalties as long as such penalties were rightfully sought at the time the suit was filed."); *See also Pan American Tanning*, 993 F.2d at 1020-121; *see also Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 890 F.2d 690, 696 (4th Cir. 1989) ("the penalty factor keeps the controversy alive between plaintiffs and defendants in a citizen suit, even though the defendant has come into compliance and even though the ultimate judicial remedy is the imposition of civil penalties assessed for past acts of pollution.")

(contrasting a case like *Pan American Tanning* where there is no dispositive administrative settlement and *Eastman Kodak* where there is a dispositive administrative settlement).

Unlike the case at hand, in each of the three main cases relied on by Defendants, the text of the agency orders explicitly stated that **all violations up to the time the order was executed** were covered. Compare the language of the three agency orders at issue in these cases cited by Defendants:

> "Kodak and the DEC entered into a consent order 'in full settlement of all civil and administrative claims and liabilities that might have been asserted by the [DEC] against Kodak…for any violations ... that occurred at [Defendant facility] prior to the effective date of this order.'" *Eastman Kodak*, 933 F.2d at 126.

> "The Stipulation Agreement recites that it 'covers all alleged NPDES/SDS Permit violations that occurred … and were known by [the agency] as of the effective date of this Agreement. The alleged violations are considered past violations that have been satisfactorily resolved or corrected.'" *Comfort Lake*, 138 F.3d at 354.

> "This Consent Decree resolves (i) the civil claims of the United States and the State for the violations alleged in the complaint through the date of lodging, and (ii) the violations alleged in the Compliance Order through the date of lodging." [Exhibit C, at 30].[9]

The broad scope of the three agreed orders above is distinctly different, however, from the limiting language of the Agreed Order at issue in this case:

> "The payment of this penalty and the Respondents' compliance with all the requirements set forth in this Order resolve *only* the matters set forth by this Order in this action. The Commission shall not be constrained in any manner from requiring corrective actions or penalties for violations that are not raised here." [Exhibit A-13 to Motion at 2-3, emphasis added].

If TCEQ had intended to enforce all violations to date in the Agreed Order with Formosa, it could have done so like in the orders above. Instead, the agency chose very specific limiting language in the disposition of the Agreed Order in this case. This language makes clear that the

[9] The district court and court of appeals determined this resolved all of plaintiff's allegations in its CWA suit. *City of Dallas*, 529 F.3d 529.

Agreed Order in this case only adjudicates a discrete number of violations rather than all alleged violations as of the date of the Order, unlike the three main cases relied on by Defendants.

In their Motion, Defendants' point to no textual evidence that the Agreed Order covers the remaining violations alleged by Plaintiffs' complaint. They rely solely on conclusory statements that all of Plaintiffs' claims are covered. The text of the Agreed Order shows it is not a dispositive administrative settlement of all of Plaintiffs' alleged violations, therefore civil penalties remain available for each day the Court concludes a violation occurred at each of Formosa's outfalls.

a. Plaintiffs are not seeking relief for the six adjudicated violations

As discussed in Section IV(C) *supra*, the Agreed Order only covers six violation events at outfalls 006, 008, and 009. Plaintiffs' complaint alleges violations at outfalls 001, 002, 004, 005 and 007, as well as many more violations at outfalls 006, 007, and 008 than the dates covered by the Agreed Order. Plaintiffs' First Amended Complaint excludes any claim for relief for the six violations adjudicated in the Agreed Order. [First Amended Complaint at ¶120]. The Court may levy civil penalties for any violation it finds to have occurred at any of the outfalls and dates not covered in the Agreed Order. Therefore, Plaintiffs' claims for civil penalties for violations from January 1, 2017 to the present day are not moot.

b. Penalties remain for all violations not reported by Formosa

Formosa admits it has not reported any floating solids discharges to TCEQ in the last five years. [Defendants' Original Answer and Defenses to Plaintiffs' First Amended Complaint, Docket No. 60 at ¶60]. Therefore, the Court can award penalties for any failure to report violations, because the Agreed Order did not address this violation at all.

B. The Court should strike Defendants' 12(c) motion to dismiss

i. Defendants did not have leave to file this claim as part of this late dispositive motion on mootness

Defendants have not properly asserted this defense and it should be stricken by the Court. This Court set a dispositive motion deadline of November 1, 2018. [Docket No. 33 at 1]. The Federal Rules of Civil Procedure permit scheduling order modifications only for good cause and with the court's consent. Fed. R. Civ. P. 16(b)(4). Defendants have not pleaded good cause nor have they sought permission from the Court to assert this dispositive motion seeking to dismiss one of Plaintiffs' claims. Defendants' motion for leave to file this dispositive motion requested this Court's permission to file a motion to dismiss *for mootness* following the ratification of the Agreed Order. [Docket No. 39 at 3]. Plaintiffs consented to the unopposed submission of that motion seeking *only* that relief. *Id*. Plaintiffs have not and would not consent to the untimely submission of a 12(c) motion for judgment on the pleadings. Additionally, the Court granted Defendants' leave to file based on the contents of the Unopposed Motion. [Order, Docket No. 43]. As Defendants did not seek or receive leave from the Court, Plaintiffs request the Court strike Defendants' 12(c) section of the Motion for failure to follow the scheduling order. Fed. R. Civ. P. 16(f)(1)(c).

ii. If the Court permits Defendants' to raise this opposed and untimely motion, Plaintiffs request the Court allow time for full briefing

By responding to this, Plaintiffs in no way waive any objection to the improper inclusion of Defendants' 12(c) motion. Defendants do not cite a single case to support their position that Plaintiffs' failure to report claim that cannot be granted. However, many courts have found that citizens may bring citizen suits under the CWA to enforce failure to report violations. *See, e.g.*, *Menzel v. County Utilities Corp.*, 712 F.2d 91, 94 (4th Cir 1983) ("[A] discharger that fails to file discharge-monitoring reports, or fails to file accurate reports, would be in violation of the provisions of its NPDES permit and would be subject to citizens' suits under 33 U.S.C. §

1365."); *Public Interest Research Group v. Magnesium Elecktron, Inc.*, 1992 U.S. Dist. LEXIS 654, 10-11 (D.N.J. 1992) ("Violations of the Act include failure to monitor or report as required by the permit and courts have permitted citizen suits to enforce the monitoring and reporting aspects of the Act.").

Plaintiffs believe the Court should strike Defendants' 12(c) motion. However, if the Court decides not to strike this part of Defendants' Motion, Plaintiffs request the opportunity to present a full brief on the issue, as this issue was not timely raised by Defendants.

VI. PRAYER

Plaintiffs pray that the Court deny Defendants' 12(b)(1) Motion to Dismiss for both of Plaintiffs' claims. Plaintiffs also pray that the Court strike Defendants' 12(c) Motion to dismiss for failure to state a claim, or alternatively, if the Court does not strike Defendants' 12(c) Motion, that the Court allow Plaintiffs to fully brief the issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been filed pursuant to the electronic filing requirements of the United States District Court for the Southern District of Texas on this the February 14, 2019, which provides for service on counsel of record in accordance with the electronic filing protocols in place

/s/
Erin Gaines